In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-40

ROBERT GONZALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1972. A petition for rehearing was denied on June 16, 1972. The petition for a writ of certiorari was filed on July 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the trial court properly declined to order the disclosure of the identity of a confidential informant.

2. Whether the concurrent sentence doctrine was properly invoked in the circumstances of this case.

STATEMENT

Following a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted on six counts of an eleven-count indictment charging that he conspired to and did distribute heroin and possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (I. 1-3, 8-12; Tr. 202).[1] On November 15, 1971, he was sentenced to eight years' imprisonment on each count, the terms to run concurrently (Tr. 226). The court of appeals affirmed (Pet. App. A).

The evidence is not in dispute. Briefly, it showed that on July 14, 1971, Robert Perry, a state law enforcement officer acting as an undercover agent, gave $165 to one Nicholas Martinez, a codefendant who pleaded guilty, to purchase heroin from petitioner (Tr. 33, 35, 38-39).[2] Martinez, to whom officer Perry had been introduced by a confidential informant (Tr.

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[1] "I." refers to the indictment. "Tr." refers to the trial transcript, in two consecutively paginated volumes. Copies of both documents are being lodged herewith.

[2] Martinez declined to testify at the trial (Tr. 139-143).

117-121), added funds of his own to those supplied him, handed the total to petitioner as Perry watched from a few yards away, and received in exchange a balloon containing heroin which Martinez then delivered to the officer (Tr. 39-43). Thereafter, on July 21 and July 27, officer Perry purchased quantities of heroin from petitioner directly (Tr. 64-76, 79-87).

On August 4, 1971, after telephonically arranging with petitioner to buy additional heroin, officer Perry drove with Martinez to petitioner's residence and parked across the street (Tr. 87-89). Shortly thereafter petitioner, carrying a brown paper bag, arrived and brought Perry into the kitchen. There he removed from the paper bag five smaller bags containing 267 grams of heroin-containing substances (Tr. 89-92, 94-100). Stating that he would go and get his money, Perry left the house, procured $13,000 from his car, gave a prearranged signal to other law enforcement officers who had been watching the premises from points nearby, and started back towards the house (Tr. 92). When Perry was half way to the front door, the officers to whom the signal had been given rushed toward the dwelling, some into the front yard and some into the back (Tr. 93, 111, 167-168). Petitioner, who had been standing in the front doorway, upon seeing the officers, fled into the house, through the kitchen, and out the back door; he was arrested in the back yard. When Perry pursued pe-

titioner into the house, he saw the five bags of heroin lying on the kitchen floor (Tr. 93, 112, 167-169).

ARGUMENT

1. The trial court, following a hearing, denied petitioner's request to compel the government to disclose the identity of the confidential informant who introduced Perry to Martinez (Tr. 117-127). There is no merit to petitioner's contention that this ruling was error (Pet. 3, 9-10). The government has a right to preserve the anonymity of its confidential informants except on a showing by the defense of a need for disclosure that outweighs the government's interest in maintaining the confidentiality of the relationship. *Roviaro* v. *United States*, 353 U.S. 53; *Rugendorf* v. *United States*, 376 U.S. 528, 534-535; *United States* v. *Kelly*, 449 F. 2d 329, 330 (C.A. 9); *Firo* v. *United States*, 340 F. 2d 597, 598 (C.A. 5), certiorari denied, 381 U.S. 929. Here, unlike the situation in *Roviaro* v. *United States*, *supra*, the informant did not participate in any of the pertinent transactions; nor did the defense present any other valid reason for requiring disclosure. The sole reason for disclosure asserted at the hearing was the wholly speculative suggestion that the informant, if identified and subpoenaed, could possibly have testified that officer Perry, contrary to the latter's sworn denial (Tr. 124), had represented himself to Martinez as a user of heroin when they were introduced. Petitioner suggested that this testimony would have been

relevant to a possible defense of entrapment (Tr. 124-127). But such testimony even if forthcoming would have been pertinent only to a claim by Martinez that he had been entrapped; it would not have supported an entrapment defense by petitioner.[3] A defendant has no standing to assert that some other person was entrapped, even if the other person was an accomplice or co-conspirator. *United States* v. *Sanchez*, 440 F. 2d 649, 650 (C.A. 9); *United States* v. *Azadian*, 436 F. 2d 81, 82-83 (C.A. 9); *Carbajal-Portillo* v. *United States*, 396 F. 2d 944, 947-948 (C.A. 9). There was no evidence that petitioner was entrapped. Indeed, the uncontroverted evidence establish the absence of entrapment.

2. Petitioner argued in the court of appeals that two pairs of counts charging illegal possession with intent to distribute and illegal distribution (on two dates) constituted only two offenses, not four. Petioner also alleged that the heroin that was found by officer Perry in the kitchen during the chase preceding petitioner's arrest, and that underlay a separate possession count, was illegally seized.

These claims do not affect the validity of the conviction on the conspiracy charge, and the court of appeals properly invoked the concurrent sentence doctrine in declining to consider the arguments with respect to the five challenged counts. *Benton* v. *Maryland*, 395 U.S. 784, relied upon by petitioner, held that the imposition of concurrent sentences does not

[3] Petitioner was not present at the meeting between Perry, Martinez and the informer (Pet. 5).

constitute a jurisdictional bar to consideration of a challenge to one or more counts not necessary to sustain the sentence. The Court did not eliminate the concurrent sentence doctrine as a discretionary tool to be properly employed in the interest of judicial efficiency. And the courts of appeals have continued to employ the doctrine in this manner. *E.g.*, *United States ex rel. Epton* v. *Nenna*, 446 F.2 363, 366 (C.A. 2), certiorari denied, 404 U.S. 948; *United States* v. *Adcock*, 447 F. 2d 1337, 1339 (C.A. 2), certiorari denied, 404 U.S. 939; *United States* v. *Barsaloux*, 419 F. 2d 1299, 1300 (C.A. 5), certiorari denied, 397 U.S. 972; *United States* v. *Hood*, 442 F. 2d 737, 742 (C.A. 7), certiorari denied, 400 U.S. 820; *Tarvestad* v. *United States*, 418 F. 2d 1043, 1046 (C.A. 8), certiorari denied, 397 U.S. 935; *Jordan* v. *United States*, 416 F. 2d 338, 346 (C.A. 9), certiorari denied, 397 U.S. 920; *Schutz* v. *United States*, 432 F. 2d 25 (C.A. 10), certiorari denied, 401 U.S. 1002; cf. *United States* v. *Spears*, 449 F. 2d 946, 948-949 (C.A.D.C.); *United States* v. *McKenzie*, 414 F. 2d 808 (C.A. 3). Since the substantive offenses involved here were all similar in character and were committed within a brief period pursuant to a single conspiratoral plan of action, the court's decision to forego consideration of the disputed substantive counts was an appropriate exercise of its discretion.[4]

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[4] In any event petitioner's contentions with respect to the counts at issue are without merit. The contention that four counts charged only two offenses assumes that the offense of possessing heroin with intent to distribute it and that of dis-

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1972.

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tributing the same heroin are in substance identical crimes. This assumption is not warranted. See *Albrecht* v. *United States*, 237 U.S. 1, 11-12, involving the possession and sale of liquor. Moreover, since cumulative penalties were not imposed, there was no prejudice. There is also no merit to petitioner's claim that the heroin involved in one count was unlawfully seized. The heroin was in plain view when, in hot pursuit of a fleeing suspect, Perry saw what he had reason to believe was heroin lying on the floor of the kitchen. The seizure of the heroin, under these circumstances, was clearly proper. Cf. *Warden* v. *Hayden*, 387 U.S. 294, 298-300; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465.

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